

Revert

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DECLINE

Suspect(s): DOC Officer K [REDACTED] R [REDACTED] and KCSO Detective A [REDACTED] T [REDACTED]

Crime: Assault Case No: 12-034551

Investigator: Det. Chris Johnson Agency: KCSO Unit: Major Crimes

We are declining to file this case in Superior Court for the following reasons:

- ☐ A. Case is being returned for filing in municipal or city court.
- ☐ B. Case is being sent to our District Court Unit for review.
- ☐ C. Case is being declined for non-evidentiary reasons.
- ☒ D. Case is being returned because it is legally insufficient.
- ☐ E. Case has been used as part of a plea package. (Cause# _____)

***** ☐ DO NOT DESTROY EVIDENCE filing on co-defendant(s).

Facts: On the afternoon of Sunday, February 11, 2012, DOC Officer R [REDACTED] went to the home of Nicholas Harrison (12-28-84) to serve a DOC Felony Arrest Warrant for Harrison's failure to report to community custody. The home was located at 37617 42nd Ave S., in Auburn, King County. Assisting DOC Officer R [REDACTED] were three KCSO Detectives: Kurt Litsjo, A [REDACTED] T [REDACTED] and Benjamin Wheeler. Prior to entry into the home, the officers used a confidential informant (CI) to go into the home to alert them as to who was present. The CI noted that in the home were Nicholas, his father Cole, his brother Shane and his 5- year- old- son (AH). The CI did not mention that Dustin Theoharis was in the home.

Officers knocked on the door and spoke with Cole Harrison. Cole informed them that Nicholas was home, and was just upstairs getting his hair cut by his brother Shane. The officers were dressed in vests that clearly identified themselves as police officers. Nicholas came downstairs and was taken into custody without incident. Detectives Litsjo and Wheeler stayed with Nicholas, Cole and AH on the main floor, while Officer R [REDACTED] and Detective T [REDACTED] were upstairs with Shane. Detective Litsjo announced on his radio that they had "1 in custody." Then Officer R [REDACTED] and Detective T [REDACTED] came downstairs toward the rest of the group. According to Detective Wheeler, the two were walking down the stairs saying something about "whether or not the roommate had guns in the house because that was an issue before." Apparently DOC had noted that at some point previously there had been a roommate living in the home who had a firearm, which would have been a violation of Nicholas's probation. None of the officers had previously been aware that anyone else was in the home.

Officer R [REDACTED] and Detective T [REDACTED] headed downstairs in this split-level home while everyone else remained on the main floor. On this main floor, a television was on in a normal volume and AH was playing. As the two officers headed downstairs,

according to Detective Wheeler, Cole asked Shane where the officers were going. Shane replied, "They are going to check on Dustin to see if he has any guns." About ten seconds later, everyone heard a rapid succession of multiple shots fired. The group on the main floor did not hear anything prior to the shots fired, but the home occupants noted that they would have heard voices only if people were yelling. From their location, they would not have been able to hear any normal conversation downstairs.

After the shots were fired, Detective Wheeler went downstairs quickly with his firearm drawn. Detective Litsjo stayed with the group on the main floor and had them get on the ground for safety. Detective Wheeler walked downstairs through a completely dark, cluttered room and then into a completely dark bedroom. The only light available was from a flashlight attached to the firearm of Detective T [REDACTED]. Detective T [REDACTED] was standing to the right of Detective Wheeler and Officer R [REDACTED] was on his left. Both were standing and pointing their firearms at a man who was now lying on the floor in a pool of blood directly next to a bed. The bed took up a large part of the room. Both officers appeared to be in a state of shock. Detective Wheeler asked what was going on, and Detective T [REDACTED] said, "He told us he had four guns, and then he started reaching for one."

Detective Wheeler stood on the bed to look down on Mr. Theoharis to see if he had a weapon nearby. He noted that the area was completely cluttered and it was difficult to see if there were any weapons in what he described as a "pile of stuff." As he stood on the bed, Detective Wheeler could feel slugs (fired bullets) on top of the bed moving around as he stepped. Detective Wheeler then started removing the blankets and other coverings from the windows to let in light so that they could start administering aid to Mr. Theoharis. Mr. Theoharis was moaning and said, "I didn't know you guys had real guns." It is unclear what he meant by this statement.

Detective Litsjo, who was with the Harrison family on the main floor, started asking questions about who else was in the home. He learned that a family friend named Dustin Theoharis had been staying in a bedroom downstairs for a few months. Cole Harrison reported that he had found Dustin with a short rifle a few days prior to this and told him to get it out of the home. Cole Harrison later reported that a day or so prior he specifically told Dustin to get his target rifle out of the home and that he was unsure if he actually did remove it. Cole Harrison also explained that he had placed the firearm in a gun safe in the room next to Dustin's and that Dustin had the combination to the safe. Cole Harrison also explained that Dustin had been using drugs, and suspected it was heroin from the needles he had seen in his room. Shane Harrison confirmed that Dustin had a rifle that his father had told him to remove just days ago. Shane was unsure if Dustin had in fact removed the gun from the home. Shane also confirmed his belief that Dustin was using heroin. He noted that he spoke with Dustin just an hour before the shooting and that Dustin was very groggy, falling asleep while sitting in a chair, and that it could have been a "drug nod off." Dustin then went downstairs to take a nap.

Aid arrived on scene soon after the shooting and took Mr. Theoharis to Harborview Medical Center, where he was treated for multiple gunshot injuries to his arms, legs,

torso and jaw. He had multiple fractures from the injuries which required a series of surgeries to repair.

In a later search of the residence, officers located heroin, needles, spoons, and a scale with heroin residue, found in multiple places in Mr. Theoharis' room. The evidence was confirmed to contain heroin by the Washington State Patrol Crime Laboratory. In a locked gun safe located just outside Mr. Theoharis' room was the loaded rifle described by Cole and Shane Harrison as belonging to Mr. Theoharis.

From an examination of the firearm belonging to DOC Officer R [REDACTED], it is believed he fired 9 shots from his 9mm service weapon. From an examination of the firearm belonging to KCSO Detective T [REDACTED], it is believed he fired between 8-10 shots from his 40 caliber service weapon. From a forensic examination of the scene, it was clear that Mr. Theoharis was shot while lying in the bed and that the shots were directed to the side of the bed next to the cluttered bed-side table.

Discussion: Under the filing standards of the King County Prosecuting Attorney's Office, criminal prosecution is warranted whenever,

Sufficient admissible evidence exists which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify conviction by a reasonable and objective fact finder.

Whether the shooting of Dustin Theoharis was a criminal act turns on the applicability of RCW 9A.16.040, which defines the justifiable use of deadly force by a public officer.

Pursuant to RCW 9A.16.040, the use of deadly force by a police officer is justified "when necessarily used by a peace officer . . . in the discharge of a legal duty." RCW 9A.16.040(1)(b).

Starting with the second part of the analysis, it is clear that the officers involved were discharging a legal duty at the time of the shooting. In this case, DOC Officer R [REDACTED] and KCSO Detective T [REDACTED] were serving a valid arrest warrant for Nick Harrison, a resident of the home. Days before the incident, Nick Harrison failed to report to DOC and had a warrant issued for his arrest. Pursuant to his probation, Nick Harrison was specifically prohibited from possessing or having under his control any firearms, deadly weapons or controlled substances. Because Mr. Harrison was out of compliance with his DOC supervision, the officers were authorized to search the residence for any contraband. See RCW 9.94A.631(1). Furthermore, while executing a warrant, officers may conduct a reasonable "protective sweep" of the premises for security purposes. See *Maryland v. Buie*, 494 U.S. 325, 334-35, 110 S.Ct 1093 (1990) (protective sweep for persons posing a danger to the officers justified).¹

¹ As Shane Harrison articulated to his father as the officers headed downstairs, "They are going to check on Dustin to see if he has any guns."

When the officers encountered Mr. Theoharis, they were in the process of clearing the residence and ensuring that there were no firearms in the home. The room where Mr. Theoharis was staying was easily accessible to the rest of the residence, and did not constitute a separate dwelling. There can be little dispute that the officers involved were acting in the discharge of a legal duty when they encountered Mr. Theoharis.

The second issue is whether the deadly force used was necessary. Unfortunately, there is very little admissible evidence to make this analysis. As criminal suspects in this case, the two officers exercised their 5th Amendment rights and did not make a voluntary statement about the incident.² And, despite requests by the State to his attorney, Mr. Theoharis also declined to make a statement about what transpired in his room during the incident. Without admissible statements from any of the three people in the room at the time of the shooting, it is difficult to conclude if the use of deadly force was in fact necessary.

The limited evidence that is admissible, however, suggests that the use of force may have been necessary. When Detective Wheeler went downstairs immediately after the shooting, he found DOC Officer R [REDACTED] and Detective T [REDACTED] still pointing their weapons at Mr. Theoharis. They appeared to Detective Wheeler to be in a state of shock. Detective T [REDACTED] then said, "He told us he had four guns, and then he started reaching for one."³ Thus, in the immediate aftermath of the shooting, Detective T [REDACTED] articulated a perceived risk to both himself and DOC Officer R [REDACTED].

Even in the absence of sufficient evidence to definitively conclude that the use of deadly force was necessary, RCW 9A.16.040 outlines a clear and complete defense to a criminal charge for a police officer acting in good faith.

A public officer or peace officer shall not be held criminally liable for using deadly force without malice and with a good faith belief that such act is justifiable pursuant to this section.

9A.16.040(3). In this case, there is no evidence to suggest that the officers were acting with malice toward Mr. Theoharis when they shot him. By all accounts, these officers had no prior experience with Mr. Theoharis. He was not listed on the warrant and he was never named in the prior law enforcement contacts with the home. Furthermore, the officers had spent mere seconds with Mr. Theoharis prior to the shooting. In that short amount of time, it would be unreasonable to conclude that they engaged in the shooting out of malice or spite toward him, especially when the rest of the encounter at the home had gone so smoothly up to that point. To the contrary, the evidence suggests that there was no hostility between the parties prior to the shooting. Notably, no one in the home heard any raised voices preceding the shooting.

² The State is aware that the officers later gave compelled statements to their employers under Garrity v. New Jersey, 385 U.S. 493, 87 S.Ct. 616 (1967). However, because those statements were not provided to the criminal investigators and are not admissible in a criminal case, the State asked that they not be provided in the materials reviewed to make this analysis.

³ This statement may be deemed admissible as an "excited utterance" pursuant to ER 803(a)(2).

According to Detective Wheeler, as DOC Officer R [REDACTED] and Detective T [REDACTED] headed downstairs, he heard Shane Harrison tell his father that the officers were headed downstairs to "check on Dustin to see if he has any guns." Within ten seconds, shots rang out. When Detective Wheeler quickly went downstairs to assist the officers, he came into a cluttered room that was completely pitch-black except for the beam of light from the flashlight attached to Detective T [REDACTED] firearm. Both officers were pointing their guns at Mr. Theoharis, who was now lying on the floor next to his bed. Both officers appeared to be in a state of shock. Detective T [REDACTED] said, "He told us he had four guns, and then he started reaching for one." Found lying in a pool of blood next to the side of the bed where Mr. Theoharis was shot was a 5- inch-long, 1- inch-wide cylindrical black metal flashlight. Also next to the bed within reaching distance of Mr. Theoharis was an end table that was filled with aluminum cans and a variety of objects, including two black remote controls. It is unclear if the officers saw these objects prior to the shooting. It wasn't until officers started quickly removing the blankets from the windows that there was some ambient lighting in the room sufficient to start administering aid to Mr. Theoharis:

Neither their behavior prior to the shooting nor after the shooting suggests that the officers were engaged in a malicious use of deadly force against Mr. Theoharis. While the number of shots seems excessive, it is not unreasonable to suggest that due to the limited visibility in the room, each officer may have been reacting to hearing the shots from the other officer without knowing where the shots were coming from. Based upon the rapid succession of shots fired, and the general police directive to fire until a threat is neutralized, the number of shots fired may not, in and of itself, be an indicator of malice toward Mr. Theoharis. As the United States Supreme Court has cautioned, "police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation." *Graham v. Connor*, 490 U.S. 386, 397, 109 S. Ct. 1865 (1989). Without additional evidence to the contrary, the State would be unable to overcome the complete statutory defense outlined in RCW 9A.16.040(3).

Conclusion: In order to prosecute DOC Officer R [REDACTED] or Detective T [REDACTED], the State would have to disprove justifiable use of deadly force. There is simply no evidence to overcome this defense. Based upon the limited information available at this time, the State declines to file criminal charges. As with all cases submitted for review, if new evidence comes to light the State will make a further analysis.

Deputy: Dan Clark (282) [REDACTED] Date: 6-19-12
Telephone Number: 206 296- [REDACTED]
Supervisor: Mark Larson [Signature] Date: 6-19-12
Detective contacted: yes(X) left message() no()

Criminal Division, King County Prosecuting Attorney's Office (296-9000) (Original to file; copies to Investigator and Chief Deputy.)